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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1202

A. L., PETITIONER,

v.

G. R. H., RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA

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OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported at 325 N.E. 2d 501, and printed in Appendix A of the Petition herein.

JURISDICTION

If this Court consents to the issuance of the Writ of Certiorari herein opposed, the Respondent is in agreement with the statements relating to jurisdiction set out by the Petitioner.

QUESTIONS PRESENTED

The Respondent, Guardian Ad Litem for G. R. H. believes the Statement of the Issues Presented for Review to be much too narrow. The Guardian Ad Litem will, therefore, address the following issues:

(1) Does the basic human right to retain the physical ability to father a child find protection in our constitutional framework, and under what circumstances, if any, may government, by judicial or legislative edict, allow invasion and destruction of that right?

(2) Does Petitioner's parental prerogative to raise her child in the way she desires take precedence over the child's right to retain his ability to procreate?

(3) Should consent of the ward be required prior to the proposed vasectomy and, if so, should the proposed vasectomy be delayed until the ward has reached his greatest intellectual development?

(4) Do Scientific Data and the evidence justify the order sought by the Petitioner?

STATEMENT OF THE CASE

The Respondent is substantially in agreement with the "Statement of the Case" appearing in the Petition; Respondent, however, points out the following additional evidence not reviewed by the Petition:

The letter of Wallace K. Dyer, M.D. specifically states that Dr. Dyer has not treated the defendant since April of 1966, and Dr Dyer "had no more contact with him until his mother came in in August, 1972, wondering about the advisability of a vasectomy on him because of his brain damage following an automobile accident about five years ago." (Tr. p. 40) The nature of Dr. Dyer's contact with the defendant himself in August 1972, if any, is not specified.

In addition to that noted in the Petition for Certiorari, the following evidence is significant:

ANN LUTTRELL:

Since Gary has been in Special Education his grades have improved, he is learning to read and he is learning history, arithmetic and spelling (Tr. p. 42) Gary likes school, modern clothes, rock and roll music and girls (Tr. pps. 43 & 44). I feel an obligation to protect Gary from things I believe he doesn't understand - I watch over him carefully (Tr. p. 46) I let Gary go out on his own and give him a certain time to be back. When he is out, he knows what he is doing. He is a good boy (Tr. pps. 48-49).

DR. SPIRO MITSOS:

Given the state which Gary has reached in his age and physical development, his awareness of the opposite sex is not in any way abnormal (Tr. p. 62).

MR. DURWOOD JOHNSON:

In the past two years Gary has shown improvement in the kind of social judgment he has, his vocabulary is improved, and overall improvement in most of the pyschological subtest areas was noted. (Tr. p. 65). Gary's present level is 7 points below the normal range. His I.Q. is presently 83. We have a classification that usually goes by ten-point areas. Present level would be dull. The retarded ranges are below 70, and from 70 to 80 is borderline. (Tr. p. 66) I feel Gary is benefiting significatly from Special Education and he has shown some significant academic achievement. (Tr. p. 66).

SUMMARY OF ARGUMENT

The right to procreate is a basic human right which is entitled to the greatest protection the Constitution can provide. This right, clearly within the penumbra of rights protected by the Ninth Amendment, is not subject to invasion by a parent or by government in the absence of absolute

necessity.

Petitioner's reliance upon her constitutional right as a parent ignores the constitutional rights and best interests of the ward of the guardian ad litem, which are also subject to protection by the Courts.

Not only case law, but scientific data and the evidence produced at trial confirm that the question of whether a vasectomy should be performed upon the ward of the guardian ad litem, Respondent herein, should await the time when the young man in question may make that decision for himself.

ARGUMENT

I

THE RIGHT TO PROCREATE IS A BASIC HUMAN RIGHT, ENTITLED TO THE GREATEST PROTECTION THE CONSTITUTION CAN PROVIDE AND IS NOT SUBJECT TO INVASION IN THE ABSENCE OF ABSOLUTE NECESSITY

From the outset, and throughout the entire consideration of this case by this Court, there should be no disagreement as to this: The right of every citizen of this nation to procreate or to retain to himself the physical power to procreate or beget offspring is a human right, a natural right in the classic sense and a most basic civil right in the constitutional sense. It was in recognition of this overpowering and fundamental principal that The Supreme Court of the United States opened its opinion in *Skinner v. Oklahoma* 316 U.S. 535, 86 L. Ed. 1655 (1942) as follows:

> "This case touches a sensitive and important area of *human rights.* Oklahoma deprives certain individuals of a right which is basic to the prepetuation of a race - the right to have offspring." 316 U.S. at 536.

The *Skinner* case involved a challenge to a state statute providing for sterilization of "habitual criminals." The statute in that case was struck down on procedural and equal protection grounds, about which more must be said later, but in the course of doing so, the Opinion of the Court again takes cognizance of that inescapable point:

> "We are dealing here with legislation which involves one of the most basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law (so) touches. Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty." 316 U.S. at 541.

The Preamble of the Constitution of the United States sets out that one of the purposes of the document is to "secure the Blessings of Liberty to ourselves and our Posterity." What more fundamental personal right could exist than the right to participate in the creation of the future generations that comprise our posterity? There may, indeed, be rights *equally* fundamental to our concepts of personal liberty, and entitled to the same degree of judicial protection from governmental intrusion, but this right in each of us to bear or beget children is more inextricably interwoven in our concepts of individual "life" and "liberty" than any other.

Admittedly, it is not the State of Indiana in this case which seeks by affirmative action of one of its own departments to cause the proposed sterilization of the Respondent to be carried out. Nevertheless, it is clear from the testimony of the Petitioner that she is unable to have the proposed sterilization of the Respondent performed in the absence of a declaratory judgment from a State Court to protect the

surgeon. (Transcript p. 38 l. 3-15) Issuance of such a declaratory judgment, that is, an affirmative form of State Action, therefore, is a necessary condition precedent to the execution of the proposed vasectomy in this case. From this set of circumstances, inevitably, the burdensome constitutional issue begging for attention in this case arises.

From the point of view of the Respondent, that issue may be framed as follows:

Does the basic human right to retain the physical ability to father a child find protection in our constitutional framework, and under what circumstances, if any, may government, by judicial or legislative edict, allow invasion and destruction of that right?

Insofar as this case represents an attempt by a parent to obtain the sanction of a state court to have her minor child sterilized in the absence of medical necessity and in the absence of eugenic abnormality in such child, this case presents a novel and frightening threat to the right of every child in this nation to retain his or her ability to beget or bear offspring. And, given the cultural and traditional environment in which we all function on a daily basis, that is to say, given American society as we know it, the ability to bear or beget offspring is inextricably bound up with the right and ability of each child to engage in the fullest kind of marital and sexual relationships.

As was recognized long ago by the Supreme Court of the United States:

> "Without doubt, liberty denotes . . . the right to marry, to establish a home and bring up children . . . and generally to enjoy those privileges long recognized at Common Law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska* 262 U. S. 390, 399 (1923).

It was not until relatively recent years, however, that judicial analysis disclosed the depth and source of the constitutional protection accorded these intertwined liberties. The issue was first squarely dealt with in *Griswold v. Connecticut*

381 U.S. 479 (1965). The clear thrust of the main opinion and the important concurring opinion of Mr. Justice Goldberg in *Griswold,* which involved the constitutionality of a statute forbidding dissemination of information relating to birth control, was that there is within the Bill of Rights a penumbra of unenumerated basic human rights which protect as inviolate every person's privacy and self-being.

> " (The) specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. (citation omitted) Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

* * *

The present case, then concerns a relationship (marital sex) lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives. . . seeks to achieve its goals by means having a maximum destructive impact upon that relationship."

* * *

"We deal with a right of privacy older than the Bill of Rights--older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commerical or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." 381 U.S. 479 at 484, 485 and 486.

In his concurring opinion, Mr. Justice Goldberg stressed the importance of the Ninth Amendment in the scheme of the Bill of Rights to protect the right of personal privacy of such matters:

"The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that * (t)he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

* * *

"Rather, the Ninth Amendment shows a belief on the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive."

* * *

"In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) . . . as to be ranked as fundamental.' *Snyder v. Massachusetts,* U.S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575. The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all civil and political institutions" '. . ." *Powell v. Alabama,* 287 U.S. 45, 67, 77 L. ed. 158, 169, 53 S. Ct. 55, 84 A.L.R. 527.

* * *

"I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.' " Id., at 521, 6 L. ed. 2d at 1006. Mr. Justice Brandies, assenting in *Olmstead v. United States,* 277 U.S. 438, 478, 72 L. ed. 944, 956, 48 S. Ct. 564, 66 A.L.R. 376, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

'The protection guaranteed by the (Fourth and

Fifth) Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred as against the Government, the right to be let alone–the most comprehensive of rights and the right most valued by civilized men.'"*

* * *

"The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights of marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected."

* * *

"Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family–a relation as old and as fundamental as our entire civilization–surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, *there are fundamental personal rights such as this one, which are protected from abridgement by the Government though not specifically mentioned in the Constitution."* 381 U.S. 479 at 519-522 (Emphasis supplied at last three paragraphs)

Since its holding in Griswold, this Court has struck out even more broadly in its effort to protect the sanctity of the individual in matters relating to procreation, whether that individual be married or single.

> "It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."* *Eisenstadt v. Baird* 405 U.S. 438 at 453 (1972 (Emphasis Supplied.)

Given the existence of this most basic of natural and constitutional rights in each citizen of this land, we then reach the larger question of whether there are any circumstances under which that right may be denied by governmental action. Undeniably, there was time in the past when the general feeling was that there were some circumstances under which involuntary sterilization by virtue of a governmental decree could properly occur. See *Buck v. Bell* 274 U.S. 200, 71 L. Ed. 1000 and *Skinner v. Oklahoma, supra.* Social concepts, however, like constitutional concepts, are not static. See: *Skinner v. Oklahoma, supra; Wade v. Bethesda Hospital, infra, Frazier v. Levi, infra.*

This case presents a significant opportunity to allow the reconsideration of the entire concept of involuntary sterilization, particularly in the case of those persons viewed by many members of our society as "burdens" because of "mental retardation."

One would like to believe that we are daily becoming a more sensitive, charitable people involved with and caring about the quality of life available to every person, young or old, rich or poor, whose existence we touch. One would like to think that we have developed enough, as a people, to recognize that one does not lightly tamper with any change or *any* product of nature, least of all the human body of a non-consenting person in the absence of medical emergency. One would like to think we have finally come to realize that no government, no religion, no organization and no person possesses that degree of wisdom which entitles it (or him) to dictate the private life style of another, non-consenting person.

That is to say, we would have realized by now that to invade and destroy the power of a non-consenting person to choose whether he or she will bear or beget children, in the absence of a medical necessity, is nothing short of assuming the role of a human but all-wise and omniscient God. The implications of that are frightening and have the ring of an Orwellian 1984 society.

Suppose, for instance, that the Court here agrees with the Petitioner, that a parent has the constitutional right in the absence of medical necessity to make the decision for her child as to whether or not the child should be sterilized. Where, then, does such a right stop? At age eighteen? Age sixteen? Will it be different for males than females? Would the intelligence level of the child make a difference? What Intelligence Quotient must a child have in order to save himself from such a decision by his parent? What test shall we use to determine the Intelligence Quotient? How about the Wechsler Adult Intelligence Scale? Or perhaps the Stanford Binet Test should be used. Both are currently popular I.Q. tests. But what if a new test is developed? Then what? And what does intelligence, as we percieve it to be, have to do with the basic human right of a person to procreate anyway? What is it that renders our current concept of intelligence and the ability to accumulate knowledge so holy and sacrosanct that we "normal people" can feel free to take it upon ourselves to decide when some

other person would be better off sexually sterile?

The point is well-enough made. The right to procreate is natural or divine in its origin, depending upon one's religious bent. It is a right which is recognized as a constitutionally protected area of individual privacy. To surgically deprive anyone of that right, permanently, without his informed consent in the absence of medical necessity, would shock the conscience and basic sense of fairness and justice in us all unless the step must be taken to protect the mass of society from unbearable danger. To accept Petitioner's position could establish every parent as a god in his own household and the power thus given could be subject to fantastic abuse.

The Petitioner here pleads for recognition of a constitutional freedom in her, as a parent, to determine that it is best for her son that he be sterilized. The transcript is void of any proof of medical necessity. The Guardian Ad Litem is reminded of a statement by John Stuart Mill in his treatise, *On Liberty:*

> "The only freedom that deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it."

At the end of the Petitioner's argument she rains upon the Court a number of rhetorical questions challenging the supremacy of the freedom claimed by Respondent to determine for himself whether he should be sterilized. The questions are emotionally charged, but their charges are defused by the record. The record here is void of evidence that any of the terrible events forecast by those questions will occur, and the same questions, each of them, could be asked with respect to any normal growing fifteen year old boy. Does Petitioner propose that this Court adopt a position which would allow the parent of any child, under any circumstance, to cause that child to be sterilized in the absence of medical necessity? Quite obviously so. The logic of her position

leads no where else.

It is the position of the Guardian Ad Litem that no man, and no man-made institution has the right or the power to require any non-consenting citizen of this country, whatever his age, whatever society's evaluation of his intellect, to be surgically sterilized under any circumstance short of either medical necessity or some inconceivable imminent national peril that might be posed by one person's ability to bear or beget a child.

II.

PETITIONER'S RELIANCE UPON HER CONSTITUTIONAL RIGHT AS A PARENT IGNORES THE CONSTITUTIONAL RIGHTS AND BEST INTEREST OF HER MINOR CHILD, WHICH ARE ALSO SUBJECT TO PROTECTION BY THE COURTS

This case clearly presents the often-overlooked conflict of interest between a minor child and his parent or guardian. In fact, Respondent's mother contends that she has the right to rear and control her child in any manner she sees fit and also has a natural and constitutional right to have her son sterilized with or without his consent. She contends that this operation is required to fulfill her duty to provide medical care for her minor child and to prevent him from engaging in tortious or criminal conduct.

One might question the Petitioner's motives in seeking this operation but nothing would be gained here by doing so. It is, however, highly noteworthy that Petitioner relies heavily upon her alleged constitutional right to see to the well-being of her son by accomplishing the requested sterilization and, at the same time, chooses to ignore the clear recognition by this nation's courts that the rights of minors are guaranteed constitutional protection as well.

The leading case in recognizing the distinction between the rights of the child and the rights of the parent is *Prince v. Massachusetts*, (1944) 321 U.S. 158, in which the U. S. Supreme Court noted:

> "Parents may be free to become martyrs themselves. But it does not follow that they are free in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

Petitioner claims that her control over her minor son is unbounded since she is following her conscience. Long ago, this Court demonstrated that the family was not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds v. United States* (1878), 98 U.S. 145, *Davis v. Beason* (1890), 133 U.S. 333, *Prince v. Massachusetts, supra.* Nor was the parent's control held to be unbridled in other areas. See also *People Ex. Rel. Wallace v. Labrenz* (1952), 411 Ill. 618, 104 N.E. 2d 769 in which the court stated "Concededly, freedom of religion and the right of parents to the care and training of their children are to be accorded the highest possible respect in our basic scheme. . ." (Citations omitted). But ". . . neither rights of religion or rights of parenthood are beyond limitation . . ." (Citations omitted).

Other restrictions under the parens patriae theory were upheld in the areas of compulsory attendance *State v. Bailey* (1901) 157 Ind. 324, 61 N.E. 730, and prohibitions of child labor *Sturges & B. Mfg. Co. v. Beauchamp*, (1913), 321 U.S. 320. So also, in *Wisconsin v. Yoder*, (1972) 406 U.S. 205, an opinion dissenting in part based on the consideration that the views of the children as to their practice of religion and education should have been considered as well as those of their parents, stated:

> "These children are 'persons' within the meaning of the Bill of Rights. We have so held, over and over again. In *Haley v. Ohio*, 332 U.S. 596,we extended the protection of the Fourteenth Amendment in a state trial of a 15 year old boy. In *In Re Gault*, 387, U.S. 1, 13 we held that 'neither the Fourteenth Amendment nor the

> Bill of Rights is for adults alone.' In *In Re Winship*, 397 U.S. 358, we held that a 12 year old boy, when charged with an act which would be a crime if committed by an adult, was entitled to procedural safeguards contained in the Sixth Amendment." *Wisconsin v. Yoder*, (1972) 406 U.S. 205, 243.

A recent case in the State of Ohio dispelled the mistaken notion that the child is a mere chattel belonging to the parent. The Court stated it thus:

> "No longer can parents virtually exercise the power of life or death over their children." *In Re Clark*, (Ohio Ct. C.P. 1962), 185 N.E. 2d 128, 131.

Petitioner also relies on the right of privacy as a grounds for subjecting her son to a vasectomy. In the recent abortion decision, *Roe v. Wade*, (1973) 410 U.S. 113, Mr. Justice Blackmun considered the problem of state interference with the right of privacy. The Court recognized that the right of privacy was not unbounded, several times making reference to the state's legitimate interest in the health and protection of human life. The dilema for the state in *Roe v. Wade* was that it was unable to cite a case which held that a fetus is a person under the Fourteenth Amendment. Mr. Justice Blackmun acknowledged at p. 156 that if the personhood of a fetus could have been established the mother's case would have collapsed for the fetus would then have been entitled to all the protections that the Federal Constitution affords to "persons." The Court concluded that at some point the interests of the state attach, allowing the state to make some regulations as to the woman's control of her own body, and the unborn person within it:

> "Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion

> decision; that the right, nonetheless is not absolute and is subject to some limitations, and at some point the state interests as to the protection of health, medical standards, and prenatal life become dominant. We agree with this approach." *Roe v. Wade* (1973), 410 U.S. 113, 155.

Thus, it is easy to see that while the courts respect the wishes of the parents in most matters concerning the family, the parents' desires are not free from limitations, and those limitations are defined in terms of the constitutional rights of the children whose lives they seek to control.

III.

THE PARENT'S CONSENT IN THIS CASE IS INSUFFICIENT AND THE RIGHT OF THE SON TO MAKE THE DECISION IN QUESTION SHOULD BE RESPECTED

The acknowledgment by the courts that the parents are not always the best guardians of the interest of the child became apparent in *Horacek v. Exon*, (D.C. Nebr., 1973) C V-72-L-299, when the court appointed guardians ad litem for the plaintiff residents of a state institution. There was a great deal of concern that the natural guardians would not pursue as vigorously as possible a suit seeking habilitation, treatment and better conditions for institutionalized persons if faced with the threat that "voluntarily" admitted children would be returned to their homes where parents would be unable to care for them.

A conflict of interest problem similar to the decision as to whether or not to sterilize a child is the decision whether or not to institutionalize him. The amici brief in *Wyatt v. Stickney*, (M.D. Ala. 1971), 325 F. Supp. 781 stated the nature of the problem:

> "The parent may be motivated to ask for such institutionalization for a variety of reasons other

than the best interests of the child himself; i.e., the interests of the other children in the family, mental and physical frustration, economic stress, hostility toward the child stemming from the added pressures of caring for him, and perceived stigma of mental retardation. The retarded child's best interests may well lie in living with his family and in the community, but theirs may not lie in keeping him." Briefs for American Psychological Association, American Orthopsychiatric Association, American Civil Liberties Union, and American Association on Mental Deficiency as Amicus Curiae, *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971.

Several different courts have considered the problem of the conflict of interest between the parent and child regarding a sterilization operation which was not medically necessary.

Frazier v. Levi, (Tex. Ct. App. 1969), 440 S.W. 2d 393, involved a 34 year old mentally incompetent woman who was sexually promiscuous. She was incapable of giving her consent or to oppose the sterilization her mother desired. The Court found that the mother could not consent to the sterilization nor could it find any other statutory or constitutional authority to order the operation. See also *Holmes v. Powers*, (Ky. Ct. App. 1968) 439 S.W. 2d 579 in which the court prohibited the county welfare department from sterilizing a mentally incompetent woman since the patient lacked capacity to consent. The court also found that it lacked the power to grant a declaratory judgment in absence of statutory or common law authority. See also *Strunk v. Strunk*, (Ky. Ct. App. 1969), 445 S.W. 2d 145 and *Wade v. Bethesda*, (S.D. Ohio 1973), 356 F. Supp. 380. In all of these cases it was determined that the courts were without jurisdiction to order a person to submit to sterilization if consent of the patient were lacking. The only case which the Petitioner can cite which is contra to this line of cases is *In Re Simpson*, (Ohio P. Ct. 1962), 180 N.E. 2d 20.

The effect of *In Re Simpson* has been severely limited by the result in *Wade v. Bethesda, supra*, both cases involving sterilization orders by the same probate court judge.

In *Wyatt v. Aderholt*, (M.D. Ala. 1974) Civil Action No. 3195-N (B) on January 8, 1974, Judge Johnson enjoined the involuntary sterilization of residents of Alabama's Partlow State Hospital and set specific standards for reviewing a recommendation for sterilization including the requirements that no resident could be sterilized without his or her voluntary and informed consent. Significantly, Judge Johnson ordered that no resident who had not reached the chronological age of 21 years should be sterilized except in cases of medical necessity as deteremined in accordance with other procedures detailed in the Court's order.

In a case which did not involve sterilization, the court in *In Re Seiferth* (N.Y. Ct. App. 1955), 309 N.Y. 80, 127 N.E. 2d 820, determined that an operation to correct a severe harelip and cleft palate of a child entering adolescense be postponed until the youth was able to decide for himself. It seems that the boy's father believed the defect would heal by the forces of nature. Such belief was transmitted to his son. While the court ordered social workers to undertake efforts to correct the boy's mistaken belief, it refused to order an operation which was recognized as necessary until the boy consented and was phychologically ready to undergo surgery and subsequent speech therapy. See also *Bach v. Long Island Jewish Hospital* (1966), 49 Misc. 2d 207, 267 N.Y. S. 2d 289 in which the court held that a minor had the power to consent to non-emergency surgery for her own benefit since it involved the minor's personal rights, not a property right which she could alter only through the intervention of a guardian or the court as "parens patriae."

On the specific subject of the adequacy of parental consent in safeguarding the rights of retarded minors faced with sterilization, Dr. Philip Roos, Executive Director of the National Association for Retarded Citizens testified:

> "I would object to that as the sole criterion for many reasons, not the least of which is that

> parents are often motivated by their own anxieties, their own unresolved conflicts, and there is a tendency to overprotectiveness. Parents are often motivated by the very strong anxiety of pregnancy in their retarded child.
>
> I would say that parental approval as such is totally inadequate as a justification for sterilization." Deposition of Philip Roos, Ph. D., p. 32, *Wyatt v. Aderholt* (M.D. Ala. 1973) Civ. Action No. 3195-N (B).

The medico-legal debates over organ transplants in minors gives further support for requirement of the minor's consent. Three unreported Massachusetts Supreme Judicial Court cases also give a good indication that the expanding trend in the law regarding surgical operations on minors is to obtain their voluntary, informed consent to such a procedure. See *Masden v. Harrison*, No. 68651 Eq., Mass. Sup. Jud. Ct., June 12, 1957, *Huskey v. Harrison*, No. 68666 Eq., Mass. Sup. Jud. Ct., No. 20, 1957. See also *Strunk v. Strunk*, *supra*, in which the Kentucky court faced with a similar decision refused to permit a transplant since the donor was incompetent to consent.

Although these Massachusetts cases involved kidney transplantations between twins, the issues closely parallel those in the case before this court. It was recognized that the healthy twin would suffer adverse psychological effects if the twin with kidney disease were to die. However, the critical question for the court in each case was whether the physician and the hospital were justified in proceeding merely on the basis of the parents' request or consent. In each case, the court emphasized that the healthy twin understood the nature of the operation and the risks involved and had consented thereto. Justice Cutter, writing the decision in *Foster v. Harrison*, *supra*, was very specific in his findings on this point:

> "Carl (the healthy twin) testified before me. He

> is a boy of fourteen with good understanding and intelligence. He is fully informed of and understands the nature of the operation and its possible risks and consequences. He has talked with a donor of a kidney in a similar operation. The mother of the boys has also been informed of the possible consequences and understands them. She consents to the operation. Carl and his mother desire that the operation take place and Carl's consent to it is the result of his own decision, free from pressure or coercion, made with admirable courage, generosity, and appreciation of the factors involved." *Foster v. Harrison*, No. 68674 Eq., Mass. Sup. Jud. Ct., No. 20, 1957 at 2-3.

Why did the court in the three Massachusetts cases and *Strunk v. Strunk*, *supra*, place such emphasis on determining if the minor had made a voluntary, informed consent? The basic reason is that this type of operation differs from the usual medical treatment to which a parent can assent. The difference is that the kidney transplants were not for the benefit of the healthy child who, in addition, would be subject to all the risks involved with surgery and the threat to his own life should his remaining kidney become diseased. The parallel between the transplantation cases and the sterilization procedure exists on this point also. The proposed sterilization of the Respondent herein is not for his benefit, as has already been admitted and asserted by the Petitioner.

In fact, there is ample expert testimony from previous involuntary sterilization suits and in professional publications that involuntary sterilization is fraught with dangers to the psychological well-being and emotional development of the person who is sterlized without his or her consent. Dr. Philip Roos, Executive Director of the National Association for Retarded Citizens, testified in *Wyatt v. Aderholt*, (M.D. Ala. 1973) Civ. Action No. 3195-N (B), a case challenging involuntary sterilizations being performed in Alabama

institutions. In response to a question as to the impact that involuntary sterilization had upon the individual, he stated:

> "I think the impact of involuntary sterilization of retarded people can be highly destructive, there is no question about it. Human beings value their reproductive capacity very highly. As a matter of fact, I think even for retarded persons there is a symbolism of immortality in begetting children. And one's self concept no doubt is closely attuned to this capacity.
>
> To deprive the individual against his will of this capacity can seriously cripple his self-concept.
>
> I would say that this is true for people of normal intelligence and I would say it is equally true for many retarded people." Deposition of Philip Roos, Ph. D. p. 21, *Wyatt v. Aderholt*, (M.D. Ala. 1973), Civ. Action No. 3195-N (B).

See Johnson, *Social and Psychological Effects of Vasectomy*, 121 Am. Journal of Psychiatry, 482 (1964); Rodgers, Ziegler, Altrocchi and Levy, *A Longitudinal Study of the Psycho-Social Effects of Vasectomy*, 27 Journal of Marriage and Family, 59 (1965).

Thus, it is easily seen that the proper course for the court to follow in this case, is to uphold the lower court's refusal to issue the requested declaratory judgment, especially since expert testimony by psychologists, Spiro Mitsos, Ph. D., and Durwood Johnson, indicates that Gary is capable of understanding the nature of the operation which his mother proposes to have performed. (Tr. 56 and 67-68). The Guardian Ad Litem does not ask this court to decide that sterilization is never an acceptable procedure but only that it protect Respondent's right to make this decision, the physical results of which are irreversible and the consequences of which will affect him for the rest of his life.

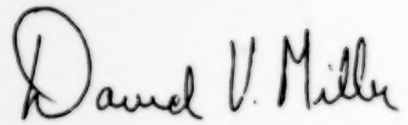
In summary, the Guardian Ad Litem contends that

Petitoner is not the proper person to consent to this operation. The Respondent must be afforded an opportunity to decide for himself whether or not to undergo an operation which may not be in his best interest and could be psychologically damaging to him.

CONCLUSION

By reason of all of the foregoing arguments, the Respondent respectfully prays that this Court deny the requested Writ of Certiorari.

Respectfully submitted,



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